

Attorneys for Plaintiff

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

DAYTON FAMILY PRODUCTIONS, et
al.,

Defendants.

**FEDERAL TRADE COMMISSION’S REPLY IN SUPPORT OF MOTION FOR
ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1 Defendant Glen Burke provides no valid reason why the Court should not enter the
2 FTC's proposed findings and conclusions. Instead, Burke urges the Court to commit reversible
3 error by repeating the same mistake that prompted the Ninth Circuit to remand the original
4 District Court decision – failure to detail its findings regarding Burke's direct-mail sweepstakes
5 scheme (the "sweepstakes scheme"). Finding no support in the law or record evidence for his
6 position, Burke instead egregiously misrepresents the record, cites no relevant authority, and
7 fails to identify a genuine dispute regarding any of the FTC's proposed findings. The Court
8 should therefore enter the FTC's proposed findings to resolve this contempt action.

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10 **For This Court to Decline to Enter Findings on Defendant's Sweepstakes Scheme Would**
11 **Be Reversible Error.**

12 Burke's primary argument is that, because the District Court's prior orders were "void of
13 any findings of fact" and "silent as [sic] the mail fraud/sweepstakes scheme," this Court is
14 somehow precluded from entering findings on that subject. Burke Resp. (Dkt. 223) at 7. But in
15 fact, the prior District Court's failure to detail its findings regarding the sweepstakes scheme is
16 *precisely the error* that prompted the Ninth Circuit to reverse and remand this matter. 9th Cir.
17 Op. (9th Cir. Dkt. 46-1) at 3-4. Specifically, after the Ninth Circuit found that the prior District
18 Court did not sufficiently support its ruling on the sweepstakes scheme, the appellate court
19 ordered, "*we remand so that the district court can provide findings* that will facilitate reasoned
20 review of its order." *Id.* (emphasis added). Burke, therefore, urges this Court to compound the
21 error, and invite another reversal and remand, by declining to enter findings regarding the
22 sweepstakes scheme.

23 Indeed, Burke cites no authority to support his position that the Court should enter no
24 findings about the sweepstakes scheme. Instead, he cites only the provision of Rule 52 of the
25 Federal Rules of Civil Procedure that governs motions to amend judgments. Burke Resp. (Dkt.
26 223) at 6. That provision has no application here – where the Ninth Circuit remanded the
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1 judgment against Burke for his involvement in the sweepstakes scheme and ***ordered this Court***
 2 ***to enter findings*** regarding that scheme.¹ 9th Cir. Op. (9th Cir. Dkt. 46-1) at 3-4. This Court
 3 must, therefore, follow the Ninth Circuit's explicit mandate that the District Court enter findings
 4 specific to the sweepstakes scheme. *See United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995)
 5 (district courts must execute mandates received from appellate courts); *Herrington v. County of*
 6 *Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) (same).

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 8 **The FTC's Proposed Findings Are Not Genuinely Disputed.**

9 The remainder of Burke's arguments constitutes general denials that his participation in
 10 the sweepstakes operation violated the Order. None of these arguments raise a genuine issue of
 11 material fact. Burke provides only sweeping statements in a brief by counsel, which are not
 12 evidence, are not supported by specific citations to admissible evidence, and – in several cases –
 13 constitute gross misrepresentations of the record.

14 Where there are no genuine issues of material fact to try, courts need not hold an
 15 evidentiary hearing before ruling on a motion for contempt. *See Peterson v. Highland Music,*
 16 *Inc.*, 140 F.3d 1313, 1324 (9th Cir. 1998) (affirming a contempt ruling based on uncontroverted
 17 affidavits); *Thomas, Head & Greisen Emp. Trust v. Buster*, 95 F.3d 1449, 1458-59 (9th Cir.
 18 1996) (affirming a contempt ruling made on the papers where parties' briefings revealed no issue
 19 of material fact). In the analogous Rule 56 summary judgment context, factual disputes require
 20 an evidentiary hearing only when the record taken as a whole would allow a reasonable

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 22 ¹ Burke's filing refers to this Court's entry of judgment for \$2,785,508.36 to dispose of the
 23 telemarketing scheme. Burke Resp. (Dkt. 223) at 8. The Court entered that judgment following
 24 the Ninth Circuit's decision that the prior Court's ruling on the telemarketing scheme was final.
 25 Burke's argument is unclear, but it appears he believes that this Court's issuance of judgment on
 26 the telemarketing scheme acted as a silent, back-door denial of the FTC's motion regarding the
 27 sweepstakes scheme. *See Burke Resp.* (Dkt. 223) at 8. This position conflates the FTC's two
 28 contempt motions and, more importantly, flies in the face of the Ninth Circuit's explicit directive
 that the District Court enter more detailed reasoning to support the sweepstakes scheme
 judgment. 9th Cir. Op. (9th Cir. Dkt. 46-1) at 3-4.

1 factfinder to rule for the nonmoving party; a mere “scintilla” of evidence does not create a
2 genuine issue of fact. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *FTC v.*
3 *Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). Furthermore, the “mere existence of *some* alleged
4 factual dispute” is insufficient to require an evidentiary hearing; the disputed facts must be
5 material. *Cf. Anderson*, 477 U.S. at 247-48 (emphasis in original); *see also Thomas*, 95 F.3d at
6 1459 (applying same principle in contempt proceedings).

7 Burke never specifically identifies any of the FTC’s proposed findings of fact as
8 disputed. Moreover, he cites no record evidence demonstrating such a dispute. Instead, he
9 enlists his counsel to make broad statements that he “had no dominion or control over the
10 [sweepstakes] mail pieces” and “had no responsibility in the creation of the sweepstakes or
11 ensuring that awards were given.” Burke Resp. (Dkt. 223) at 4-5. Burke cites no specific
12 evidence to support these statements, only stating vaguely that his claims are based on
13 “Affidavits, Declarations and deposition testimony of witnesses including Errol Seales, Inger
14 Kiss, and Lindsay Reid.” Burke Resp. (Dkt. 223) at 4.

15 Burke’s counsel misrepresents the testimony and evidence in the record and thus does not
16 identify any genuine issue of fact, let alone a material issue. Contrary to Burke’s counsel’s
17 claims, Errol Seales testified that Burke’s duties included “consulting” on the content of the
18 mailers. Def. Exh. C (Dkt. 188-3) ¶¶ 7-12. Similarly, sweepstakes employee Lindsay Reid
19 testified that she “fulfilled” prizes only at Burke’s direction and with his funds, and that she
20 approached Burke directly with questions and concerns about the sweepstakes. PX28 (Dkt. 179-
21 2) at 15:21-25, 22:12-24, 29:1-7, 35:10-21, 60:13-61:19, 65:7-17, 76:15-77:8, 79:15-80:7, 87:10-
22 88:10, 88:11-19. Finally, Burke never addresses emails he wrote and documents found in his
23 offices that show his direct role in creating the deceptive mailers and withholding the promised
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1 prizes. *See* FTC Proposed Findings and Conclusions (Dkt. 222-1) at ¶¶ 15-18, 30-33 (citing
2 uncontroverted evidence).²

3 The only factual dispute with any basis in the record is irrelevant to Burke’s liability and
4 thus not material. *See Thomas*, 95 F.3d at 1459 (evidentiary hearings required only to resolve
5 “**material** issue[s] of fact”) (emphasis added); *cf. Anderson*, 477 U.S. at 247-48. Burke argues
6 that Errol Seales, not Burke, was the ultimate owner of the operation, and cites Seales’ testimony
7 to that effect. *See* Burke Resp. (Dkt. 223) at 4-5. But Burke’s own direct and substantial
8 involvement in deceiving consumers makes him liable for contempt even if he ultimately
9 answered to Seales. The Order specifically and definitely prohibits Burke from
10 “misrepresenting, in any manner, directly or by implication, or failing to disclose any fact
11 material to a consumer’s decision to purchase any item, product, good, service, or investment;” it
12 contains no exceptions permitting Burke to deceive consumers as long as he acts at another’s
13 direction. *See* Order (Dkt. 122) at Sec. II.B. A party bound by an order must “take all
14 reasonable steps within [his] power to comply,” *In re Dual-Deck Video Cassette Recorder*
15 *Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993), and therefore cannot evade liability for his
16 actions by claiming that he was just following orders. In any event, the uncontroverted evidence
17 described in the FTC’s proposed findings and conclusions shows that Burke managed the day-to-
18 day aspects of the sweepstakes operation, is responsible for its misrepresentations to consumers,
19 and is, therefore, liable for the harm resulting from his contempt.

22 ² Burke further fails to address his invocation of the Fifth Amendment in discovery to avoid
23 answering any questions about his involvement in the sweepstakes. *See* PX29 (Dkt. 179-4),
24 *passim* (Burke’s deposition transcript). Burke’s invocation permits the Court to draw inferences
25 against him and prevents him from testifying at any later hearing. *See, e.g., Nationwide Life Ins.*
26 *Co. v. Richards*, 541 F.3d 903, 910-12 (9th Cir. 2008) (and cases cited therein); *cf. United States*
27 *v. \$133,420 in U.S. Currency*, 672 F.3d 629, 641-42 (9th Cir. 2012) (and cases cited therein).
28 Burke’s inability to testify about his own actions in the sweepstakes scheme – the only facts
material to this proceeding – underscores the absence of any genuine issues of material fact.

1 Finally, Burke's efforts to shift the Court's focus to associate Katrinka Willard are
2 similarly based on immaterial facts. He claims that Willard was a "rogue employee" who "went
3 on a spree of her own doing sweepstakes mailers." Burke Resp. (Dkt. 223) at 5. But Burke does
4 not claim that he never participated in the sweepstakes or that Willard committed the fraud
5 attributed to Burke; instead, he freely admits that he worked for the sweepstakes operation
6 alongside Willard. *See* Burke Resp. (Dkt. 223) at 5 (admitting that Burke was a "consultant" to
7 sweepstakes operation and calling Willard a "rogue employee" of that operation). Thus, the fact
8 that Willard conducted her own fraudulent activities alongside Burke is irrelevant to **Burke's**
9 liability.

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11 **Burke Misrepresents the Record in a Failed Attempt to Mitigate His Liability.**

12 Finally, Burke claims that he was "absent from the office" for "large periods of time" for
13 medical treatment, and claims this should mitigate his liability. Burke Resp. (Dkt. 223) at 5-6.
14 To support his claim, Burke cites the FTC's forensic analyst, who testified to his findings about
15 the computer on Burke's desk at his office. *Id.* But contrary to Burke's claim that he was out of
16 his office for "large periods of time," the forensic analyst found that files on Burke's computer
17 were last modified on December 13, 2012 – mere weeks before the Court entered the temporary
18 restraining order that shut down the sweepstakes scheme. *See* PX35 (179-23) at ¶ 12C
19 (declaration of forensic analyst); Temporary Restraining Order (Dkt. 133) (order entered January
20 28, 2013). Burke does not and cannot explain how an absence of a few weeks could mitigate his
21 liability for a scam that he participated in for at least five and a half years. *See* PX30 (Dkt. 179-
22 10) at ¶ 10 (the scheme's payment processor processed transactions for Burke from May 2007
23 until January 2013).

24 Furthermore, even if Burke last used the computer *in his office* in December 2012,
25 undisputed evidence shows that Burke continued to violate the Order in the operation's final
26 month. *See, e.g.,* PX31 Att. C (Dkt. 179-15) at 72 (email from Burke dated January 18, 2013,
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scheduling payment to sweepstakes' print shop). Indeed, Burke remained so involved in his businesses during his treatment that one of his main list broker contacts did not realize Burke was ill. PX29 (179-3) at 184:14-20, Exh. 66 (Dkt. 179-9 at 27) (email from Burke dated January 25, 2013 to list broker stating that Burke has two more weeks of treatments and broker's response: "Wow – didn't realize you were having a problem.").³ Just as the Order contains no exceptions permitting Burke to deceive consumers at another's direction, it contains no clause excusing violations he commits outside of his office. *See* Order (Dkt. 122) at Sec. II.B.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the FTC's motion for entry of findings and its proposed findings and conclusions, the FTC requests that the Court enter findings and conclusions holding Burke liable for his involvement in the sweepstakes scheme and entering a contempt judgment for \$17,389,232.

Dated: September 17, 2015

Respectfully submitted,

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³ Finally, Burke again claims that the FTC should have "initiate[d] a new proceeding against the alleged parties in the telemarketing and mail fraud/sweepstakes scheme" rather than filing motions for contempt against Burke. Burke Resp. (Dkt. 223) at 8. Burke's argument ignores well-established authority holding that a party to an action has the right to invoke the court's contempt powers by initiating a civil contempt proceeding. *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444-45 (1911).

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Federal Trade Commission's Reply in Support of Motion for Entry of Findings of Fact and Conclusions of Law on September 17, 2015, by the following means:

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